

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ALICE BULLARD**

Claimant

VS.

**SHAWNEE COUNTY**

Respondent

Self-Insured

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Docket No. 220,423

**ORDER**

Respondent requested Appeals Board review of Administrative Law Judge Bryce D. Benedict's July 13, 1998, Award. The Appeals Board heard oral argument on February 24, 1999.

**APPEARANCES**

Claimant appeared by her attorney, Beth Regier Foerster of Topeka, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Jeff K. Cooper of Topeka, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge awarded claimant a 52.5 percent work disability. Respondent appeals and contends claimant is not entitled to a work disability. Respondent argues, since claimant was released to return to work after bilateral carpal tunnel surgery by her treating physician without restrictions and she lost her job not because of her work-related injuries but because of economic reasons, she is not entitled to a work disability. Respondent asserts that under these circumstances claimant is limited to permanent

partial disability benefits based on her functional impairment. Respondent contends the facts of this case are similar to the facts in the case of Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997). In Watkins, the court denied claimant a work disability when claimant lost his job as a result of the employer declaring bankruptcy and closing the store where claimant was employed. In that case, claimant had suffered a work-related injury and had returned to work to an unaccommodated job at a comparable wage, had received an award of functional disability, and was seeking a work disability because he was not working as the result of the closing of respondent's store. In the alternative, the respondent contends, if the Appeals Board finds claimant is entitled to work disability, the record supports only a 27 percent work disability instead of the 52.5 percent awarded by the Administrative Law Judge.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Appeals Board agrees with the Administrative Law Judge's analysis of the evidence, his findings, and conclusions relating to claimant's entitlement to a work disability. Those findings and conclusions are accurate and supported by the record. It is not necessary to repeat those findings and conclusions in this Order. Therefore, the Appeals Board adopts the Administrative Law Judge's findings and conclusions as its own as they relate to the issue of whether or not claimant is entitled to a work disability.

But the Appeals Board finds that beginning as of July 23, 1997, claimant is only entitled to a 38.42 percent work disability instead of the 52.5 percent found by the Administrative Law Judge.

First, the wage loss component of the work disability test that was found by the Administrative Law Judge to be the difference between claimant's stipulated pre-injury average weekly wage of \$494.94 and claimant's post-injury average weekly wage of \$235.22 results in a loss of 52.5 percent instead of the 52.4 loss found by the Administrative Law Judge.

Second, the Appeals Board finds the record supports only a work task loss of 24.35 percent instead of the Administrative Law Judge's finding of 52.7 percent. The Appeals Board agrees with the Administrative Law Judge that neurosurgeon Craig H. Yorke, M.D., simply did not express an opinion on the question of claimant's work task loss. Dr. Yorke's philosophy, even for surgical patients, is to not to place restrictions on the patient until they have tried to perform their regular job. The Administrative Law Judge did not give any weight to Dr. Yorke's opinion in regard to claimant's permanent work restrictions. The Appeals Board agrees with the Administrative Law Judge and finds that Dr. Yorke's work restriction opinion is too conservative in this case and will not be given any weight in determining claimant's work task loss.

Orthopedic surgeon Sergio Delgado, M.D., was appointed by the Administrative Law Judge to perform an independent medical examination of the claimant. Dr. Delgado placed permanent work restrictions on claimant to avoid repetitive work if possible and if required to perform repetitive work, to only perform such work for a two-hour period before taking a break. Also, claimant was limited to lifting 30 pounds with both upper extremities and 15 pounds with a single extremity, avoid use of vibratory tools, and working in cool environments.

The doctor reviewed a list of work tasks claimant had performed in 15 years preceding her accident and found claimant could no longer perform 7 of the 26 work tasks. On a time-weighted basis, this represents a 21.1 percent work task loss.

At claimant attorney's request, plastic and hand surgeon Lynn D. Ketchum, M.D., examined and evaluated claimant. He restricted claimant to computer keying two hours in the morning and two hours in the afternoon with no repetitive gripping of more than 30 percent of the work day. Dr. Ketchum also reviewed the same work task list as Dr. Delgado and found claimant was unable to perform 10 of the 26 work tasks. On a time weighted basis, this represents a 27.6 percent work task loss.

Based on Dr. Delgado's and Dr. Ketchum's testimony, the Administrative Law Judge found that claimant's work task loss was 52.7 percent. The Administrative Law Judge found that the record supported the combining of two separate work tasks listed as numbers 1 and 4. The Administrative Law Judge found that when those two tasks were combined then claimant's work restrictions as imposed by Dr. Delgado and Dr. Ketchum prohibited claimant from performing those tasks. On a time weighted basis those two tasks increased claimant's work task loss by 23.9 percent.

The Appeals Board disagrees with the Administrative Law Judge. The work task list that both Dr. Delgado and Dr. Ketchum reviewed was completed by vocational expert Dick Santner after interviewing the claimant. During Mr. Santner's deposition, he was not asked nor did he express an opinion on whether work tasks numbers 1 and 4 should be combined into one work task. Although claimant's attorney attempted to get Dr. Ketchum to express an opinion on the combination of these two work tasks, she failed in the attempt. Dr. Delgado was not asked to express an opinion on whether or not claimant had lost the ability to perform those work tasks if they were combined. Thus, Dr. Delgado's and Dr. Ketchum's opinions did not change and both doctor's testified that claimant retained the ability to perform work tasks numbers 1 and 4.

The Appeals Board concludes that both Dr. Delgado's and Dr. Ketchum's work task loss opinions should be given equal weight resulting in a work task loss of 24.35 percent.

As required by K.S.A. 1996 Supp. 44-510e, claimant's work task loss of 24.35 percent is averaged with claimant's wage loss of 52.5 percent resulting in a work disability of 38.42 percent.

The parties stipulated to an April 23, 1996, accident date, a pre-injury average weekly wage of \$494.94, and a 12 percent permanent functional impairment rating. Claimant worked at her regular job at a comparable wage until she left for her first carpal tunnel release on December 2, 1996. Accordingly, from April 24, 1996, through claimant's last day worked of December 2, 1996, she is entitled to permanent partial disability benefits based on her 12 percent permanent functional impairment. See K.S.A. 1996 Supp. 44-510e. Then claimant was paid 14.14 weeks of temporary total disability benefits. Dr. Yorke released claimant to return to work on March 18, 1997. Respondent did not return claimant to work, and claimant made a good faith effort to find work but did not find employment until July 22, 1997. During that period, claimant is entitled to a work disability based on a 100 percent wage loss that equals a 62 percent work disability. Thereafter, commencing on July 23, 1997, claimant is entitled to the 38.42 percent work disability. The Administrative Law Judge also computed the Award using a weekly compensation rate of \$330.13 per week when the weekly compensation rate for an April 26, 1996, date of accident was \$326 per week.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bryce D. Benedict's July 13, 1998, Award should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Alice Bullard, and against the respondent, Shawnee County, a qualified self-insured, for an accidental injury which occurred April 23, 1996, and based upon an average weekly wage of \$494.94.

Claimant is entitled to 14.14 weeks of temporary week of compensation at the rate of \$326 per week or \$4,609.64, followed by 31.86 weeks of permanent partial disability compensation at the rate of \$326 per week or \$10,386.36 for a 12% permanent partial disability, followed by 18.14 weeks of permanent partial disability compensation at \$326 per week or \$5,913.64 for a 62% permanent partial disability, followed by 109.44 weeks of permanent partial disability compensation at \$326 per week or \$35,677.44 for a 38.42% permanent partial disability, making a total award of \$56,587.08.

As of May 20, 1999, there is due and owing claimant 14.14 weeks of temporary total disability compensation at the rate of \$326 per week or \$4,609.64, and 31.86 weeks of permanent partial disability compensation at \$326 per week or \$10,386.36, and 18.14 weeks of permanent partial disability compensation at \$326 per week or \$5,913.64, plus 95.29 weeks of permanent partial disability compensation at the rate of \$326 per week in the sum of \$31,064.54, for a total of \$51,974.18 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$4,612.90 is to be paid for 14.15 weeks at the rate of \$326 per week, until fully paid or further order of the Director.

All authorized medial expenses are ordered paid by the respondent.

All remaining orders contained in the Award are adopted by the Appeals Board that are not inconsistent with this Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS  
Jeff K. Cooper, Topeka, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director